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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 05 2009
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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

In this decision, the term "prior counsel" shall refer to [redacted], who represented the petitioner prior to the denial of the petition. The term "counsel" shall refer to the present attorney of record.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time she filed the petition, the petitioner was a doctoral candidate and research assistant at the University of Southern California (USC) School of Dentistry. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and additional exhibits.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the

Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on July **27, 2007.** Several letters accompanied the initial filing. [redacted], who has supervised the petitioner's work at USC since 2002, stated:

> The significance of [the petitioner's] original work is that researchers could visualize the *changes of size, shape, and aggregation pattern* of protein molecules from the nano-scale during degradation. . . . [The petitioner's] research created an advanced understanding of the fundamental mechanisms of proteolytic activities involved in the formation of dental enamel at nano-scale. These findings will provide the fundamental knowledge required for the design and development of novel biomaterials, which would potentially be applied in clinical dentistry and other areas of biomedical and biomaterial technology, such as implants and prosthetics.

[redacted], a member of the petitioner's dissertation committee, stated:

> [The petitioner] has developed a digest and binding assay, which represents an important methodological advance in the biomineralization field. The significance of this novel technique is that it provides an *in vitro* system which mimics the dynamic process of enamel formation *in vivo*. This technique has been a major breakthrough in our understanding of the control of enamel protein degradation and biomineralization. Based on this methodology, [the petitioner] has developed a model of protein-mineral interaction, leading to consequent biomineralization. This model is also a reliable reference for bone formation and has provided a novel approach for studying the maintenance of the mineralized tissue, providing valuable insight for the treatment and prevention of the pain and suffering from bone diseases such as osteoporosis.

[redacted] of the University of British Columbia was on the USC faculty when the petitioner began her studies there. He stated that the petitioner's work "is of special importance for oral-facial clefts research" because the protein degradation process that the petitioner studies is also involved in the fusion of facial bones.

[redacted] of the University of California, San Francisco, who knows of the petitioner "through her mentor [redacted] as well as through presentations that she has made at international meetings," stated that the petitioner "has been instrumental in advancing the work on MMP-20, a proteinase that is critical for enamel formation, and its effect on amelogenin assembly and mineral binding. This work is very important for our understanding of tooth mineralization."

[redacted] of the University of Maryland, who took notice of one of the petitioner's published articles, stated that the petitioner's "research will significantly improve the efficiency of bone grafting and greatly reduced [*sic*] the danger of immune reactions and cross contaminations of host diseases in clinical applications." [redacted] speculated about what "will," "should" or "could" eventually result from the petitioner's work.

On September 24, 2008, the director instructed the petitioner to submit documentary evidence to show that other researchers have cited the petitioner's published work. In response, the petitioner submitted copies of six articles and a book chapter, all containing citations to the petitioner's work. [redacted]

is an author of four of the articles and the book chapter. Thus, five of the seven documented citations are self-citations by citing her own prior work with the petitioner.

The petitioner submits printouts from the web site of Seikagaku Corporation in Japan (http://www.seikagaku.co.jp), referring to one of the petitioner's articles in relation to Emdogain, "a Medical device used in dentistry to induce regeneration of periodontium." Prior counsel claimed: "Petitioner's paper was the third one [out of 23] the corporation relied on to develop this product." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Beyond this general principle, the record contradicts prior counsel's claim that Seikagaku "relied on [the petitioner's work] to develop" Emdogain.

The petitioner's paper is listed third simply because it appeared in *Biomaterials* and the research papers are listed alphabetically by journal title. More importantly, the list does not corroborate prior counsel's claim that Seikagaku "relied on [the petitioner's] article to develop" Emdogain. One article in the same list has the title "Influence of enamel matrix derivative (Emdogain) and sodium fluoride on the healing process in delayed tooth replantation; histologic and histometric analysis in rats." Another article is entitled "The application of an enamel matrix protein derivative (Emdogain) in regenerative periodontal therapy: a review." The use of the registered trademark "Emdogain" in the titles of these articles proves that Emdogain already existed, and was in use, when those articles were published in 2007.[1] Therefore, the evident purpose of the list is to highlight researchers' use of Emdogain, rather than to identify source materials that led to the development of Emdogain.

Prior counsel's demonstrably false claim that Seikagaku Corporation "relied on [the petitioner's work] to develop this product" is not, by itself, grounds for denial of the petition, but it is a reason to be skeptical of any claim of fact for which an attorney acting on the petitioner's behalf fails to provide supporting evidence.

The petitioner submitted three new letters, all from witnesses who know the petitioner primarily from contact at professional conferences. [redacted] of Baylor College of Dentistry stated that the petitioner "was the first researcher to apply the nanotechnology [to] dental research." [redacted] also stated: "We applied her methods to a few projects of dentin research in our lab and got very good results. We plan to publish our data in the future." Alluding to the low citation rate of the petitioner's work, [redacted] stated: "it takes [a] long time for a result of research to be published [in] peer reviewed journals. It takes [a] much longer time for a published research result to be digested by peers and referenced in such peers' later publications."

With respect to the time lag between publication and appearance of citations, we turn to the petitioner's own published work. Disregarding self-citations by the petitioner or her collaborators, the record shows that, in 2004, the petitioner cited an article published in 2002. In 2006, she cited an article from 2005.

[1] According to the Trademark Electronic Search System (http://www.uspto.gov/ebc/tess/index.html), the U.S. Patent and Trademark Office registered "Emdogain" as a trademark on August 6, 1996. Bioventures N.V. Corporation, Netherlands Antilles, filed the trademark application. (Printout added to record September 22, 2009.)

Most of the cited works were older, but clearly nothing prevented the petitioner from citing the work of others a year or two after publication.

of Harvard School of Dental Medicine stated; "I believe [the petitioner] has made outstanding contributions to the exploration of molecular mechanisms of protease function on normal dental enamel formation." [redacted] stated that he first became aware of the petitioner's work "when I read her breakthrough on research about one major enamel protease, MMP20."

[redacted] of the University of Michigan credited the petitioner with "a significant breakthrough in revealing the mechanisms of enamel formation." [redacted] asserted that the petitioner developed a "new biocompatible material [that] is a promising alternative to traditional restorative materials for the treatment of teeth damaged by dental caries" and "will also successfully prevent caries in these areas of high susceptibility." [redacted] did not state to what extent, if any, this material is already in clinical use.

The director denied the petition on December 17, 2008, stating that the petitioner's minimal citation record consisted mostly of self-citations by herself or a co-author. The director acknowledged the petitioner's submission of witness letters, but found that those letters presented subjective opinions rather than verifiable evidence of the petitioner's wider influence on her field.

On appeal, counsel argues: "The evidence presented shows that Petitioner/Appellant has made considerable contributions in the field of dental science." The petitioner submits copies of recent manuscripts and four new witness letters.

All of the new witnesses met the petitioner at the same conference in 2004. One letter is a follow-up letter from [redacted], who states that the petitioner's "research findings . . . helped my laboratory in redirecting research projects on these two proteins, which are crucial for the formation of healthy teeth."

[redacted] of the University of California, San Francisco, states that the petitioner "has made very important contributions in the field of dental research" concerning the development of natural tooth enamel and "new ideas and concepts for the synthesis of artificial enamel." [redacted] asserts that he had "great success" using "a similar method as [the petitioner's]" in an attempt to synthesize enamel *in vitro*.

University of Pennsylvania Professor [redacted] states: "I also began to apply enamel protease techniques following in the path laid down by [the petitioner]."

McGill University Assistant Professor stated that, after learning of the petitioner's use of Dynamic Light Scattering to study tooth proteins, "we began to use this technique to study bone proteins."

The director did not conclude that the petitioner's work has been entirely without influence. Indeed, the fundamental purpose of published scientific research is to make one's findings available to others. At issue is the extent of the petitioner's impact, not whether she has had any impact at all. Individual researchers have attested that the petitioner's work has affected the direction of their own research, but the available evidence does not allow us to conclude that the petitioner was an especially influential figure in her field, even before she completed her Ph.D. studies. Between the low independent citation rate of her published work, and the assertions by several witnesses that the petitioner's work "will" or "could" eventually result in important future developments, at best we must conclude that the petition was filed prematurely, before these expectations could be realized. It may be that the petitioner's work will one day prove to have significantly influenced the general direction of research in her specialty, but this is not yet evident. As we know from prior counsel's claims about the petitioner's role in the invention of Emdogain, the question is not whether the record contains exaggerated claims – it surely does – but rather the extent of those exaggerations. Given the speculative nature of many witness letters and the demonstrable exaggeration regarding the petitioner's influence, we see little basis for giving the petitioner the benefit of the doubt in this regard.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.